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No. 80-1792

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM DOUGLAS HODGES, PETITIONER

v.

CASPAR W. WEINBERGER,
SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly refused to enjoin court-martial proceedings against petitioner and to order his release from the Navy on the grounds that petitioner was ineligible to enlist in the Navy and was enlisted in violation of a recruiting office instruction.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court (Pet. App. 3a-12a) is reported at 500 F. Supp. 25.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1981. The petition for a writ of certiorari was filed on April 27, 1981, as of April 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, with the consent of his parents, enlisted in the Navy on May 31, 1978. At that time, petitioner was 17 years old and in the tenth grade; because he had not completed eleven years of education, petitioner was not eligible to enlist in the Navy.[1] His enlistment application and other documents, however, stated incorrectly that he had completed the eleventh grade, and petitioner signed two statements that the information in those documents was correct (Pet. App. 5a-6a).

The recruiting officer sent petitioner's school a form asking for confirmation of the information petitioner provided. Recruiting office instructions required that the form leave a blank space where school officials could supply the number of years of education an applicant had completed. Instead of follow-

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[1] 10 U.S.C. 505(a) provides, in part:

> The Secretary * * * may accept original enlistments in the * * * Regular Navy * * * of qualified, effective, and able-bodied persons who are not less than seventeen years of age nor more than thirty-five years of age. However, no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control.

This provision does not refer to education level. We are advised by the Department of the Navy, however, that under the Navy Recruiting Manual, an applicant was ineligible to enlist unless he achieved a certain score on an index designed to predict success in the Navy. This index reflected age, number of dependents, aptitude, and other factors, as well as education level. Petitioner qualified under this index only because he was treated as having had eleven years' education when he enlisted; the government stipulated that if accurate information had been used, petitioner would not have been eligible to enlist.

ing these instructions, the recruiting officer sent a form with the information already supplied. A school official signed the form without correcting the error. For purposes of the summary judgment motions and the motion to dismiss in this case, the parties stipulated that the recruiter knew or should have known that petitioner was ineligible for military service and that he recruited petitioner in violation of applicable regulations (Pet. App. 6a).

Petitioner took the required oath and entered the Navy on August 25, 1978 (Pet. App. 5a). On April 3, 1979, after petitioner had completed his basic training and been assigned to duty, he was charged with unauthorized absence from his organization, in violation of Article 86 of the Uniform Code of Military Justice. The charge was referred to a summary court-martial, but on May 10, 1979, before court-martial proceedings began, petitioner again left his organization without authorization. On March 10, 1980, he surrendered himself to the Navy (Pet. App. 6a).

While petitioner's court-martial proceedings were pending, he brought this action in the United States District Court for the Eastern District of Pennsylvania, claiming that his enlistment was invalid and seeking an order enjoining his military prosecution and compelling the Navy to discharge him from service (Pet. App. 3a-4a). Relying on *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), the district court dismissed the complaint, holding that petitioner's proper remedy was to raise his claims in the military courts (Pet. App. 9a-11a). The court of appeals summarily affirmed (*id.* at 1a-2a).

ARGUMENT

The district court correctly held that petitioner's effort to enjoin the court-martial proceedings was barred by *Schlesinger* v. *Councilman, supra.* In *Councilman,* a serviceman attacked the jurisdiction of a court-martial on the ground that the offense with which he was charged was not " 'service connected' " (420 U.S. at 740). This Court held that because the serviceman could "show no harm other than that attendant to resolution of his case in the military court system," it was improper for a federal district court to enjoin the court-martial proceedings. *Id.* at 758. Petitioner attempts to distinguish *Councilman* on the ground that *Councilman* involved a challenge to the subject matter jurisdiction of the court-martial, whereas petitioner challenges the court-martial's "*in personam* jurisdiction" (Pet. 6). In this connection, petitioner cites (Pet. 5) three cases—*Toth* v. *Quarles,* 350 U.S. 11 (1955), *Reid* v. *Covert,* 354 U.S. 1 (1957), and *McElroy* v. *Guagliardo,* 361 U.S. 281 (1960)—in which the Court permitted collateral federal proceedings to interrupt courts-martial. For several reasons, however, petitioner's argument fails.

First, the Court in *Councilman,* in distinguishing the *Toth* line of cases, relied not on a formal distinction between "in personam" jurisdiction and "subject matter" jurisdiction but on much more substantial bases. In *Toth, Reid,* and *McElroy,* the Court observed, the petitioners seeking to interrupt the courts-martial "were *civilians* who contended that Congress had no constitutional power to subject them to the jurisdiction of courts-martial" (420 U.S. at 759). The Court explained that, for this reason, it would have been unfair and perhaps unconstitutional to require them to submit to the military justice sys-

tem. See *ibid.*; *Noyd* v. *Bond*, 395 U.S. 683, 696 n.8 (1969).

Petitioner, however, like the serviceman in *Councilman*, "was on active duty when the charges against him were brought" (420 U.S. at 759). Moreover, petitioner suggests no basis for a constitutional challenge to the jurisdiction of the court-martial. It is undisputed that petitioner voluntarily and knowingly enlisted in the Navy with the consent of his parents; he concealed the facts which demonstrated that he was ineligible. He does not allege that the recruiter misled him to his prejudice or coerced him. This Court long ago held that a serviceman in such a position may constitutionally be tried by court-martial (see *In re Grimley*, 137 U.S. 147 (1890)), and there is no unfairness in remitting petitioner to a system of military justice that he voluntarily accepted. In addition, the basis for petitioner's challenge to the court-martial's jurisdiction appears to be the decision of the Court of Military Appeals in *United States* v. *Russo*, 1 M.J. 134 (C.M.A. 1975), which held that "where recruiter misconduct amounts to a violation of the fraudulent enlistment statute [10 U.S.C. 884,[2]] * * * the resulting enlistment is void as contrary to public policy" and the court-martial lacks jurisdiction over the enlisted person. 1 M.J. at 137. The Court of Military Appeals based this

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[2] 10 U.S.C. 884 provides:

> Any person subject to [the Uniform Code of Military Justice] who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.

doctrine—which has since been overruled by Congress (see pages 6-7, *infra*)—principally on the need to provide an added deterrent to violations of 10 U.S.C. 884 (see 1 M.J. at 136). It did not suggest that a voluntary and knowing enlistment would be constitutionally defective.

Second, this Court has suggested that the decisive element in the *Toth* line of cases was that military courts have no special expertise in resolving "constitutional claims of the type presented" there. *Noyd* v. *Bond*, *supra*, 395 U.S. at 696 n.8; *Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 759; see *id.* at 763-765 & n.1 (Brennan, J., dissenting). Not only is petitioner's claim not constitutionally based, but a court considering the claim must have at least as much specialized knowledge of military life as a court considering the claim of "service connectedness" involved in *Councilman*. While the government has conceded here that the recruiter did not follow regulations, the question remains whether the recruiter's actions justify barring court-martial jurisdiction. This requires an assessment of the severity of the violation, an appreciation of whether it prejudiced petitioner or only the Navy, and knowledge of how widespread such violations are and of what sanctions might deter them. All of these matters are within the expertise of military courts.

Finally, the Court has noted that the plaintiffs in the *Toth* line of cases "raised substantial arguments denying the right of the military to try them" (*Noyd* v. *Bond*, *supra*, 395 U.S. at 696 n.8). Petitioner's claim on the merits is insubstantial. On November 9, 1979, Congress amended the Uniform Code of Military Justice to make clear that the U.C.M.J. applies to any person who voluntarily enlists with "* * * the

capacity to understand the significance of enlisting in the armed forces * * *. [A] change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment." 10 U.S.C. (Supp. III) 802(b).[3] This amendment was enacted expressly to overrule the *Russo* doctrine, which, the Senate Committee stated, "created a serious problem in the military services * * *. The committee strongly believes that these doctrines serve no useful purpose, and severely undermine discipline and command authority. No military member who voluntarily enters the service and serves routinely for a time should be allowed to raise for the first time after committing an offense defects in his or her enlistment, totally escaping punishment for offenses as a result." S. Rep. No. 96-197, 96th Cong., 1st Sess. 121 (1979).

Petitioner does not and cannot deny that he fits within the terms of the 1979 amendment. Nor does he contend that the amendment is unconstitutional. See *In re Grimley, supra.*[4] Thus petitioner's claim is

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[3] The amendment also provides (10 U.S.C. (Supp. III) 802(c)):

> Notwithstanding any other provision of law, a person serving with an armed force who—
>
> (1) submitted voluntarily to military authority;
>
> (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;
>
> (3) received military pay or allowances; and
>
> (4) performed military duties;
>
> is subject to [the U.C.M.J.] until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

[4] In the courts below, petitioner urged that the amendment cannot be applied retroactively. The legislative history, in describing *Russo* as an anomaly damaging to military discipline, strongly suggests that Congress intended to apply the

not sufficiently substantial to justify the extraordinary remedy of interfering with the pending court-martial proceedings.

Petitioner's reliance on *Parisi* v. *Davidson*, 405 U.S. 34 (1972), is misplaced. *Parisi* did not involve the same issue as *Councilman*; the Court specifically noted that "the issue in this case does not concern a federal district court's direct intervention in a case arising in the military court system" (*id.* at 41). *Parisi* concerned a serviceman who sought habeas corpus relief in order to obtain his release from the military. The Court held that the district court was required to entertain the serviceman's claim, even though court-martial proceedings were pending against him. But it was crucial to the Court's decision that the serviceman had exhausted his administrative remedies before seeking habeas corpus relief. See *id.* at 37, 45.

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amendment retroactively. Congress may legislate retroactively where its action is not irrational or unnecessarily burdensome (see *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-19 (1976)); the interests identified by Congress show that the retroactive abolition of the *Russo* doctrine is reasonable. Moreover, petitioner does not allege that he somehow relied on the *Russo* doctrine for assurance that he could violate military law with impunity (see *United States* v. *Caceres*, 440 U.S. 741, 752-753 (1979)) and it is unlikely that any such reliance would be justifiable.

In any event, one of petitioner's unauthorized absences extended past the effective date of the 1979 amendment. Thus he cannot avoid military prosecution even if his retroactivity argument succeeds, and "[n]eedless friction" (see *Noyd* v. *Bond*, *supra*, 395 U.S. at 696) between the federal district courts and the military system can best be avoided by permitting the military tribunal to resolve his jurisdictional claim in the first instance.

While petitioner did seek to have the district court order his release from the military, and the district court's denial of relief was affirmed by the court of appeals, it is not clear that petitioner raises this issue in this Court. In any event, petitioner has made no attempt to exhaust his administrative remedies.[5] We are advised by the Department of the Navy that petitioner could have sought relief for an invalid enlistment from the Commander, Naval Military Personnel Command, or from the Board for Correction of Naval Records (see 10 U.S.C. 1552; 32 C.F.R. Part 723). The record does not reflect that petitioner took either step.[6]

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[5] In addition, while the government stipulated that petitioner's enlistment was contrary to internal Navy rules (see note 1, *supra*), petitioner has not shown that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States * * *" (28 U.S.C. 2241(c)(3)). It is therefore not apparent that petitioner could obtain habeas corpus relief to secure his release from the Navy even if his allegations were true and he had exhausted his administrative remedies.

[6] Petitioner asserts (Pet. 4) that "[n]o administrative remedies were available * * * at the time that this action was commenced." Petitioner may be suggesting that the Navy would not ordinarily consider discharging a serviceman while court-martial proceedings are pending. Even if this is true, it does not follow that the administrative remedies are inadequate. In *Parisi*, the Court explicitly endorsed the practice of delaying a discharge to which a serviceman is entitled, pending the outcome of court-martial proceedings, in those cases in which the military tribunal must determine whether the basis for the discharge furnished a defense to the court-martial prosecution. 405 U.S. at 45 n.13, 46 & n.15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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